Supreme Court, U.S.
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No. 97-858

In The

Supreme Court of the United States

October Term, 1997

INO INO, INC., RHONDA REMUS, ESMERALDA SILVA, VICTORIA MCKNIGHT, and DEJA VU-BELLEVUE, INC.,

Petitioners,

v.

CITY OF BELLEVUE, WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GILBERT H. LEVY*
MARY V. ORTEGA
200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

**Counsel of Record*

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ARGUMENT

Reply to Argument That There Is No Federal Issue Raised By The Award Of Attorney's Fees.

In regard to the issue of whether Washington's rule awarding fees to the defendant is preempted by Title 42 United States Code § 1988, Respondent's reply completely mischaracterizes the record. Respondent stated that Petitoner Ino Ino asserted its claims primarily under the Washington Constitution. *See*, Respondent's Brief in Opposition at 5. Respondent stated that Petitoner did not obtain temporary relief under federal law. *Id.* at 6. Respondent stated that, "there is very serious doubt that federal law had anything to do with the trial court's decision to grant and then vacate equitable relief". *Id.* at 9. None of these representations are correct.

In the complaint, Plaintiff pleaded federal constitutional claims as well as state constitutional claims. *See*, Appendix to Petition at 107-114. The motion for a temporary restraining order sought to restrain the "four foot rule" on federal constitutional grounds, or, alternatively, on state constitutional grounds. *See*, Appendix to Respondent's Brief in Opposition at 19-37. In claiming that the "four foot rule" violated the First Amendment, Petitioners cited this Court's decision in *City of Renton v. Playtime Theater, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), as well as other federal cases. *Id.* at 21, 22. There is no indication in the Order Granting Temporary Relief that the trial court relied on state rather than federal law. *See*, Appendix to Petition at 164. The trial court's findings upholding the Ordinance discussed both federal and state cases and did not differentiate between

federal and state constitutional claims. *Id.* at 83 through 94. The opinion of the Washington Supreme Court noted that Petitioners claimed that the Ordinance violates federal and state constitutions. *Id.* at 8.

Assuming that the suggestion that the Petitioners' lawsuit was "primarily" based on state law is a reasonable basis for allowing Washington to apply its "no fault" fee shifting rule in lieu of Title 42 United States Code § 1988, that claim is simply not borne out by the record. There is nothing in the record to indicate that this was anything other than a civil rights lawsuit, properly filed in state court, which relied on both federal and state constitutional claims.

To an extent, Respondent is correct in suggesting that the two lower court cases cited by Petitioners do not provide clear precedent for the preemption claim. *See,* Opposition at 6-8. On the other hand, Respondent has not cited any cases which directly provide to the contrary. The two cases mentioned in the Opposition, *Blue v. Department of the Army*, 914 F. 2d 525 (4th Cir. 1990), and *Del Rio v. Jetton*, 55 Cal. App. 4th 30, 63 Cal. Rptr. 2d 712 (Cal. App. 2 Dist. 1997), deal with Federal Civil Rule 11 sanctions, or with malicious prosecution, wherein the standard for awarding fees to the the Defendant is similar to the standard for awarding fees to the Defendant under Title 42 United States Code § 1988, which is that the suit was vexatious, frivolous, or brought to harass. *Hensley v. Eckerhart*, 461 U.S. 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). Thus, in the cases cited by Respondent there is no inconsistency between the countervailing fee shifting rule and the congressional policy underlying § 1988, which would provide the basis for a preemption claim.

The absence of any clear precedent from the lower courts should serve to illustrate that this is an unsettled area of the law which requires prompt and ultimate determination by this Court.

CONCLUSION

The Writ of Certiorari should be issued to the Washington Supreme Court.

Respectfully submitted,

GILBERT H. LEVY*
MARY V. ORTEGA
200 Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-0670

Counsel of Record